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IN THE

Supreme Court of the United States

October Term, 1946

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND MOTION

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE
HENRY W. ANDERSON
GEORGE D. GIBSON
JOHN W. RIELY
Electric Bldg., Richmond 12, Va.
For Insurance Group Committee

SIDLEY, AUSTIN, BURGESS & HARPER
KENNETH F. BURGESS
RAY GARRETT
GEORGE RAGLAND, JR.
WALTER J. CUMMINGS, JR.
11 South LaSalle Street
Chicago 3, Illinois
For Reorganization Committee

GRANT, SHAFROTH & TOLL
MORRISON SHAFROTH
WILLIAM GRANT
Equitable Building
Denver 2, Colorado
For Insurance Group Committee

HUGHES & DORSEY
MONTGOMERY DORSEY
International Trust Building
Denver 2, Colorado
For Reorganization Committee

RATHBONE, PERRY, KELLEY & DRYE
ALEXANDER M. LEWIS
70 Broadway, New York 4, N. Y.
For Central Hanover Bank and Trust Company, Trustee, Rio Grande Western Railroad Company First Trust Mortgage

STEWART & SHEARER
W. A. W. STEWART
45 Wall Street
New York 5, N. Y.
For United States Trust Company of New York, Trustee, Denver and Rio Grande Railroad Company Consolidated Mortgage

DAVIS POLK WARDWELL SUNDERLAND & KIENDL
EDWIN S. S. SUNDERLAND
JAMES L. HOMIRE
15 Broad Street
New York 5, N. Y.
For Guaranty Trust Company of New York, Trustee, Rio Grande Western Railroad Company Consolidated Mortgage

MILBANK, TWEED, HOPE, HADLEY & McCLOY
ARTHUR A. GAMMELL
15 Broad Street
New York 5, N. Y.
For The Chase National Bank of the City of New York, Trustee, Denver and Rio Grande Western Railroad Company Refunding and Improvement Mortgage

November 9, 1946.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit and Motion.

Insurance Group Committee, as holders of affected bonds, Reorganization Committee, as the agency for consummating the reorganization of The Denver and Rio Grande Western Railroad Company, and the Indenture Trustees for each issue of senior affected bonds respectfully pray that a writ of certiorari issue to review an order entered in the United States Circuit Court of Appeals for the Tenth Circuit by Judge Phillips on November 2, 1946.

This case is a sequel to *Reconstruction Finance Corporation, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, ... U. S. ...., 90 L. ed. 1134 (June 10, 1946), where the Court affirmed orders of the District Court for Colorado approving and confirming a plan for the reorganization of the Rio Grande and remanded to the District Court for further proceedings. In obedience to the mandate of this Court, the District Court has been proceeding with the necessary steps to consummate the Plan during the month of December. Petitions for rehearing on the basis of alleged changes in conditions, all of which had been presented to this Court before the original decision, were denied by this Court on October 28, 1946. But within the same week, and on the basis of the same contentions so rejected by this Court, Judge Phillips, of the Circuit Court below, entered a summary order on November 2, 1946, staying until further order of that court all proceedings for the consummation of the Plan.

This Petition is filed to ask speedy review of that action in this Court and the speedy entry of an order setting aside Judge Phillips' stay, in order that the mandate of this Court may be forthwith obeyed and the Plan be consummated in accordance with it. The prayer is also to bring the whole

cause before this Court before judgment so that final relief may be forthwith granted, vacating the stay, dismissing the appeal below from the District Court's order of October 30 denying a rehearing (or, in the alternative, summarily affirming the District Court's order of October 30) and granting the other relief referred to in the "Prayer and Motion" below. At the same time with this petition, there is filed a petition for writs of mandamus and prohibition so that the relief sought may be granted on any basis.

OPINIONS BELOW

No written opinion was delivered below, either in the District Court or in the Circuit Court.

The District Court order, containing an opinion (R. 14), and its oral remarks upon entering the order (R. 77-83) are not reported.

The stay order entered in the Circuit Court (R. 27-28) is not reported.

JURISDICTION

The stay order of the Circuit Court was entered on November 2, 1946. The order of the District Court was entered on October 30, 1946.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., §347(a)).

STATUTE INVOLVED

The issues involve Section 77(f) of the Bankruptcy Act (11 U. S. C., §205(f)), quoted in its entirety in the Appendix.

QUESTIONS PRESENTED

1. After final affirmance in this Court of an order confirming a reorganization plan for a railroad, is it within the power of a Circuit Court, or a Judge thereof, to enjoin compliance with the mandate of this Court?

2. Even if the circumstances might still be reexamined below after such adjudication in this Court, is it within the power of the Circuit Court to take such action when no consent to such reexamination has been given by this Court, and the District Court, to whose discretion any motion for rehearing is addressed, has in terms found that the motion fails to state such a case as would justify reexamination of the original determinations?

3. Even if the Circuit Court had power to reexamine the judgment in such circumstances, and in that connection to stay all further proceedings until final decision by it, should not this Court forthwith receive and decide the whole case where (*i*) no claim of changes in circumstances is made except claims heretofore urged upon this Court and rejected by it, (*ii*) it is manifest, in the light of the record and those matters of which judicial notice may properly be taken, that such changes in conditions as have occurred since the decision of this Court have all been adverse to the Debtors' contention and (*iii*) to abandon the case to the ordinary appellate program would consume so much time that identical motions and appeals might be again initiated upon its conclusion and thus forever defeat execution of this Court's judgment?

4. Is not certiorari an appropriate appellate procedure by which all these questions may now be decided and final justice done?

SUMMARY OF ARGUMENT

1. When, by decision of this Court, an order confirming a Plan becomes final, it conclusively determines all controversy as to participation under the Plan, including the question of what classes shall participate, and what classes shall not, so that it is not competent for the Debtor to reopen this question and the Circuit Court was thus without power to enjoin compliance with the mandate of this Court.

2. Even if it were competent for the Debtor to reopen the question, that could be done, in the absence of consent by this Court, only by a motion for rehearing, addressed to the discretion of the trial court, and when such a motion is denied by the trial court on the ground that it fails to state such a case as would justify reconsideration of the original determinations, the order of denial is not appealable and the Circuit Court was thus without power to enjoin compliance with the mandate of this Court.

3. Even if the Debtor's motion, or its denial, were reviewable on appeal, there could be no doubt that (*i*) all claims made in the motion have previously been urged upon this Court in this same reorganization and rejected by it in its decisions of June 10, 1946, and October 28, 1946, and (*ii*) there has been no change of conditions since either of those dates except changes adverse to the Debtor's contentions.

4. Certiorari affords a proper means by which this Court may correct departures from its mandate below or stay action beyond the limits of power, and even if the question were one within the power of the Circuit Court to review, this Court will, in the circumstances, hear and determine the case without awaiting final action of the Circuit Court in view of the public interest that the regulatory scheme be made a workable one and the processes of the courts remain a means for reaching a result rather than a perpetual circuit for blocking reorganizations.

STATEMENT

A plan for the reorganization of the Rio Grande was approved by the District Court for Colorado on October 25, 1943, and confirmed by it on November 29, 1944. On appeals by the Debtor and by City Bank Farmers Trust Company, as Trustee under the most junior bonds (the General Mortgage Bonds), those orders were reversed by the Circuit Court below on May 10, 1945, in order that more liberal treatment might be provided for the General Mortgage Bonds, though the Circuit Court approved the finding that the old stock had no value.[1] Judge Phillips sat in this appeal and concurred in result, though his separate opinion may imply that some provision should be made for the old stock.[2]

On petition by holders or representatives of each class of affected senior securities, certiorari was granted on October 8, 1945. The Debtor also petitioned for certiorari and, pending action on the petition, submitted all its contentions, both for the General Mortgage Bonds and for the old stock, in brief and oral argument. By an opinion and order of June 10, 1946, Frankfurter, J., dissenting, this Court reversed the action of the Circuit Court, affirmed the orders of the District Court that approved and confirmed the Plan and remanded to the District Court for further proceedings. At the same time the Debtor's petition for certiorari was denied.

Two orders staying the issuance of the Court's mandate to the District Court were entered on ex parte applications of the Debtor in July and August, but the third application was heard in chambers by Mr. Justice Reed and denied on August 19, 1946. The mandate, dated August 27, 1946, thereupon issued.

The Debtor had filed a Petition for Rehearing on July 2,

[1] See printed Transcript of Record, Nos. 278-282, October Term, 1945, p. 254.

[2] Id. at p. 260.

1946, and a Supplemental Petition for Rehearing on August 15, 1946, renewing its original contentions that reduced interest rates and increased prosperity required the Plan to be set aside, and urging also that all prior applications of Section 77 had been rejected by discussions in the 79th Congress. These petitions, together with other petitions by the Trustee for the General Mortgage Bonds, were denied on October 28, 1946.

The District Court thereupon proceeded at once to consider a motion of the Debtor, previously filed, asking that the orders approving and confirming the Plan be vacated and the cause remanded to the Interstate Commerce Commission because of the same alleged changes of conditions previously urged before this Court. Insurance Group Committee, representing holders of affected senior bonds of various classes, and the senior Indenture Trustees moved the court to deny the Debtor's request summarily, without hearing testimony, on the grounds that (*i*) the controversy was closed by the final judgment of this Court and (*ii*) even if it were competent for the Debtor to reopen the controversy, the Debtor's motion failed to state such a case as would justify reconsideration of the original determinations (R. 10-12). This motion was supported by the Reorganization Committee appointed pursuant to the Plan to carry it out. After full argument, the District Court sustained this position and entered an order denying the Debtor's motion on these exact grounds (R. 14).

Thereupon the Debtor filed a notice of appeal to the Circuit Court below and immediately gave notice of an application for an order by the Circuit Court, or a Judge thereof, staying all further proceedings for the consummation of the Plan. Judge Phillips heard this motion at once, without awaiting the record below. It was resisted by Insurance Group Committee and the Reorganization Committee on each of the grounds asserted in the District Court and on

the further grounds that there was no appealable case and that the Circuit Court had no jurisdiction.

On November 2, 1946, Judge Phillips, having received the record from the District Court, entered the order in question (R. 27-28), staying all further proceedings for the consummation of the Plan until final disposition of the appeal after argument before the Circuit Court at its term beginning January 13, 1947, well after the date planned for the consummation of the reorganization.

ARGUMENT

1.

The Judgment of This Court Closed the Controversy and the Circuit Court had No Power to Enjoin Execution of the Mandate.

However large may be the opportunities under Section 77 for litigation and delay, surely it must have been the Congressional design to provide some determinable time when the controversy closes. That, we believe, was in terms provided by the first two sentences of subsection (f):

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof . . . and all creditors . . . Upon confirmation of the plan, the debtor . . . shall have full power and authority to, and shall put into effect and carry out the plan . . . under and subject to the supervision and the control of the judge . . ."

There could be no clearer way of saying that, subject only to the right of judicial review, a confirmation order finally determines all questions of participation under the Plan, including the question of what classes shall participate and what classes shall not. The words "subject to the right of

judicial review" give special emphasis to this result, for they show that, while the determination made by a confirmation order may be revised or upset on appeal, there shall not be any other way of reopening it, such as the way attempted by the Debtor in its motion to vacate the confirmation order immediately after its final affirmance by this Court.

There is a further indication of the legislative intent to this effect. Chapter X, providing for industrial reorganizations, contains an express provision that a plan may be modified "before or after its confirmation" (Sec. 222). A similar provision was in subsection (f) of the earlier Section 77 B. The inclusion of a provision for modification after confirmation in the statute for industrial reorganizations, and its omission from the railroad statute, is strong corroboration of the Congressional intent that a finally adjudicated confirmation order closes the controversy. It is of interest, in this connection, to note that the policy for finality of confirmation is so strong that, despite these words in Section 77 B, the Circuit Court of Appeals for the Seventh Circuit held in *In re Diversey Building Corp.*, 141 F. 2d 65, 68 (1944), that:

> "We cannot accept appellant's interpretation of subsection f of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the court and was being executed under the court's supervision . . . We interpret subsection f to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation . . ."

A fortiori a decree of confirmation is final under Section 77 where there is no such provision for subsequent modification.[8]

This clear Congressional purpose is in no way undermined by the next sentence of subsection (f) of Section 77 that:

> "The property dealt with by the plan, when transferred and conveyed to the debtor . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities. . ."

These words are merely confirmatory of the legal situation created by the final confirmation order. Indeed, there is nothing left to determine with respect to classes, like the old stockholders represented by the Debtor here, who receive nothing under the Plan. The situation, in short, is the familiar one where an adjudication in equity conclusively determines the rights of the parties, though the formal modification of their prior legal rights may, as a matter of technique, be postponed until the actual execution of the decree. For example, an agreement to sell land is specifically enforceable in equity, and a decree of specific performance conclusively determines the rights of the parties, though the old legal title may formally remain in the promissor until a deed is delivered in execution of the decree.

The confirmation order finally affirmed by this Court is, by its terms, a complete and final disposition of the Debtor's case. The words are:

> "(b) The provisions of the Plan and of this Order shall forthwith become and be, and are hereby declared

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[8] Of course, this clear Congressional purpose controls, for the courts sit only to carry out the Act, and it is immaterial for present purposes that, under other statutes, the general rule is that the entire process of reorganization is "open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152, 1942; and see *In re Equitable Office Building Corp.*, C.C.H. Bankr. Serv. ¶55,722 (1946)).

to be, final and binding, upon the Debtor and the Subsidiary Debtor, and all of their respective stockholders . . . and all creditors . . .

"(d) The rights of all stockholders and creditors . . . shall be only those provided by the Plan.

"(e) The Debtor . . . is, authorized and directed, and shall have full power and authority, to take all steps, and to do all things, necessary . . . to put into effect and carry out the Plan and the orders of this Court relative thereto . . .

"(i) This order shall become, and it is hereby declared to be, effective immediately upon its entry . . ." (Printed Transcript, Nos. 278-282, October Term 1945, pp. 230-2).

In summary, Section 77 contemplates that a confirmation order shall be in final form and, when put in that form, shall finally determine all questions of participation under the Plan. The confirmation order entered in this case on November 29, 1944, was in final form. Its final affirmance by the orders of this Court entered June 10, 1946, and October 28, 1946, completed the adjudication of the controversy. To permit the controversy to begin all over again at this time deprives the statutory scheme of all possibility of result and deprives the mandate of this Court of all dispositive effect. The Debtor should be no more entitled here than elsewhere in the law to appeal from an execution of a final judgment. If so, the Congressional scheme for a workable and expeditious method to reorganize interstate carriers is paralyzed for all practical purposes.

The holding of the District Court to this effect was, therefore, right, and the Circuit Court was without power to reconsider the issues on appeal or to issue its injunctive order staying execution.

2.

Even If It were Competent for the Debtor to Reopen the Merits, the District Court's Denial of That Motion Here Was Not Appealable.

It is settled law, in bankruptcy proceedings as elsewhere, that:

> "An appeal does not lie from the denial of a petition for rehearing." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149-150, 1942.)

It is uniformly recognized that this rule applies under Section 77, and that motions to vacate or modify orders, as the Debtor's motion here in terms is, are motions for rehearing within the meaning of this rule. *Old Colony Trust Co.* v. *Kurn*, 138 F. 2d 394, 395 (C.C.A. 8, 1943); *In re Chicago, Milwaukee, St. Paul & Pacific R.*, 155 F. 2d 489, 492 (C.C.A. 7, 1946), *cert. den.*, ... U. S. ...., 15 L. W. 3147 (October 14, 1946). So if there be any interest in going beyond point 1 above, that Judge Phillips' order is in conflict with the mandate of this Court in this proceeding, it is also true that Judge Phillips' order is in conflict with prior decisions of this Court and in conflict with decisions of other circuit courts of appeals.

Judge Symes, to whose views this Court has given "especial weight" in view of his extensive "familiarity with the reorganization" (90 L. ed. at 1154), heard full argument on the Debtor's motion. By his order (R. 16) he correctly characterized it as a petition for a rehearing and then, in the exercise of his discretion to which alone it was addressed, denied it on the ground, among others, that:

> ". . . the Petition for Rehearing fails to state a case which justifies reconsideration by this Court of the issues already determined;"

Under settled law, the denial of the motion on this ground was not appealable, and that objection was duly made in the record that was before the Circuit Court as well as in oral argument (R. 11, 34). There was, accordingly, no power in the Circuit Court to hear the case or to enter its order staying all further proceedings in the District Court in execution of this Court's mandate.

This result is required not only by the uniform tenor of authority, but also by the policies of Section 77, which make the District Court a part of the composite tribunal, closely "brigaded" with the Commission (*Palmer* v. *Massachusetts*, 308 U. S. 79, 87, 1939), to weigh and determine matters of fact, and attribute, as we have seen, finality to its confirmation order subject only to "the right of judicial review." The field so covered by statute is not one in which there may be imported alien concepts of the old common law for reexamination of the issues in an independent proceeding called a bill of review. But even if a bill of review were permissible under Section 77, it is surely a sound principle that the bill will not lie, after an appeal, except upon consent of the highest appellate court that has decided the case, for the power should reside somewhere to put an end to the Debtor's program of perpetual motion through the courts. This Court has so held. Speaking of a bill of review in a trial court to impeach a judgment that had been acted on by an appellate court, it held:

> "Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. . . The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in

which case a bill of review cannot be filed in the lower court." (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248, 1944).

This is accepted as standard practice:

> "Since a bill of review can only be entertained by the court which rendered the decree or judgment sought to be vacated, and it is powerless to entertain and act upon such a bill while an appeal is pending, leave so to do and a remand of the cause must be obtained from the appellate court if the particular remedy is to be resorted to at that stage of proceedings. The approved practice appears to be to apply to the trial court for leave to file a bill of review and to ask that, if it grants such leave, it request a remand of the cause and record from the appellate court. It is also held that, after an appeal has been determined and decree entered according to the mandate, leave should be obtained from the appellate court before seeking the setting aside of the judgment by bill of review in the lower court. In other words, the bill itself is directed to the lower court, but it can only be entertained and determined by that court with the consent of the higher one, after the latter has reviewed the record; and this is true even when the ground of the bill is newly discovered evidence. . . ." (*Cyclopedia of Federal Procedure*, Vol. 8, Sec. 3603, pp. 352-3, 2d Ed. 1943)

The rule is well known to the Circuit Court below, which had previously held in another case:

> "But when a judgment has been affirmed on appeal and the mandate spread of record, a bill of review based on newly discovered evidence will not lie without leave of the appellate court to file; and therefore if the case be treated as a bill of review it was properly dismissed for

want of such leave." (*Brady* v. *Beams*, 132 F. 2d 985, 986, C.C.A. 10, 1942).

But nothing in the Debtor's motion invokes any principle of a bill of review, nor did its counsel so characterize it any stage below. No consent of this Court was obtained for its filing. It can not, therefore, be properly considered as such a bill, but may be treated only as a motion for rehearing, which the trial court did. In either alternative, there was no case before the Circuit Court and it had no power to overrule the mandate of this Court by enjoining all action in accordance with it for the consummation of the Plan.

3.

The Debtor's Motion States No Case Meriting Further Consideration, but Is Merely Repetitive and Frivolous.

If either point 1 or point 2 above is well taken, it is unnecessary for the Court to consider the Debtor's motion or what it says. But even if neither of those points were well taken, it is manifest that the Debtor's motion is purely repetitive of issues determined by this Court and made for the sole purpose of delay. In such circumstances, in a reorganization of these dimensions where the public interest is involved in a speedy conclusion of the proceedings, in the unification of the two railroad systems to be accomplished thereby and in the consummation of the Plan at or near the end of the calendar year, this Court may appropriately consider and determine the whole matter without awaiting final action by the Circuit Court.

In this point 3 we examine the Debtor's motion to show that in fact it is merely repetitive of contentions heretofore submitted by it to this Court and rejected.

The main premise of the Debtor's motion is an alleged

change of economic conditions affecting reorganization values. This is stated in Sections 2 and 3 and particularized in Section 4.[4]

The only concrete specifications are three, which we may briefly notice as follows:

(*a*) the decline in interest rates;

(*b*) the Geneva Steel Plant; and

(*c*) what is called "a permanent elevation of the national income."

This argument of interest rates was, as the Court will recall, one of the main bases on which the Debtor asked the Court to reverse the confirmation of the Plan. In its original brief of February 15, 1946, the Debtor urged that interest rates had declined from a level of 4 per cent to a level of 3 per cent, so that, even if reorganization values were to be determined by earnings, a complete revaluation was required by this event (pp. 32-33). In support of this assertion the Debtor asked the Court to take judicial notice of all recent railway financing, and set out in its brief a table of 20 issues (pp. 33-34).

The Court in terms rejected that contention:

[4]There is no need to note Section 1, dealing only with the question of whom the Debtor represents. The course of this case makes it abundantly clear that City Bank Farmers Trust Company, Trustee, which did not join in the motion, represents the General Mortgage Bonds, and the Debtor speaks only for the holders of the old stock. Nor do we now need to notice the claim in Section 5 that all prior applications of Section 77 have now been invalidated by discussions in the 79th Congress in connection with the unsuccessful effort to amend Section 77 by S. 1253. Quite apart from the fact that S. 1253 did not repudiate the rationale of Section 77 as proclaimed by this Court, but on the contrary left it operative as to the Rio Grande and a number of smaller carriers, and proposed only to promulgate a new system for other roads, the issue has now been concluded by the Court's order of October 28 denying the Debtor's Supplemental Petition for Rehearing in which that contention was submitted at length.

"We note also the contention that the possibility of a national income much higher and interest rates much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate." (90 L. ed. at 1145)

* * * * *

"Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943." (90 L. ed. at 1154).

As if this were not enough, the Debtor renewed the same contention in its Petition for Rehearing filed July 2, 1946. Indeed, a decline of 1½% was then asserted, as against the 1% in February.[5] The Court's rejection of that petition on October 28 is a final rejection of the argument.

Nor is there any possibility of any argument that interest rates, reflecting composite judgments on the cost of money and the future of the rails, have declined since this Court acted on June 10. The Court may judicially notice standard market quotations, as it did in its original decision (90 L. ed. at 1147). When the opinion of this Court was handed down on June 10, the Dow-Jones average of 10 first grade rail bonds was 117.25. On October 30, it was 109.76. This deterioration is, of course, all the more acute in the second grade rails, where the average declined from 100.61 to 89.09. The Rio Grande is by no means better than these general averages. When-issued market quotations for the new securities under the Plan showed on June 10 a bid for

[5]Petition for Rehearing, p. 7; Supplemental Petition for Rehearing dated August 15, 1946, pp. 3-4.

the new First's of 101 and for the new Income's 79. On November 1 the corresponding figures were 90 and 59. Manifestly the Debtor's motion wholly fails to state any case justifying reconsideration.[6]

The argument about the Geneva Steel Plant is also one repeatedly pressed on the courts before. Judge Phillips took judicial notice, in his concurring opinion on the merits in the original appeal, of the probable continuation of the Geneva Steel Plant through the peace-time future.[7] The Debtor, in its main brief of February 15, 1946, before this Court, urged that the Geneva Steel Plant

> "... is certain to be revolutionary in its contribution to the new earning power of the Debtor's properties (p. 38; see also pp. 25 and 39).

All this was considered by this Court, together with evidence of record contemplating that the Geneva Steel plant would continue operation after the war in such manner as to make a substantial contribution to the earnings of the road.[8] The decision of this Court that the Plan should be confirmed and carried out in spite of this objection leaves no opportunity for the same issue to be relitigated now.

The last, and perhaps most fundamental, contention in the Debtor's motion is that greater prosperity awaits the future of the Rio Grande than could have been anticipated. This, of course, was likewise its basic argument against the Plan before this Court. Its main brief of February 15, 1946 argued that:

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[6] All of these quotations are from issues of "The Commercial & Financial Chronicle" dated June 10, 1946, June 17, 1946, and November 4, 1946.

[7] Printed Transcript, Nos. 278-282, Oct. Term 1945, p. 261.

[8] Printed Transcript, Nos. 278-282, Oct. Term 1945, pp. 995-6 and 1016.

> "There are other new factors which permanently elevate earning power to a level far above that which could possibly have been estimated." (p. 33),

and that the whole national income would surely be greater for the long term future. But, by words already quoted above, this Court rejected that argument, pointing out first that these factors "were before the Commission when it made its earnings estimate" (90 L. ed. at 1145) and then holding that:

> "Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943." (90 L. ed. at 1154)

This Court then took judicial notice of the petition filed by the railroads before the Interstate Commerce Commission on April 15, 1946, for increased freight rates, and quoted from the petition as to the "critical" situation of the railroads in view of the great increases in wages and costs of materials and supplies and the great reduction of traffic and revenue from the war time peak. The Court then said:

> "The Denver apparently did not vary greatly from this over-all picture." (90 L. ed. at 1149n.),

and added:

> "Even before the transportation difficulties of 1946, it was obvious that the Commission's judgment was being confirmed by events." (90 L. ed. at 1148-9).

There can be no serious suggestion that there has been any improvement in economic conditions or prospects since the decision of this Court on June 10, or since the earnings period considered in the Court's opinion. In support of its conclusion, the Court took judicial notice of the operating reports of the Rio Grande for January and February of 1946 and pointed out that operating revenues for that period were 18% below the corresponding period of 1945 (90 L. ed. at 1149n.). Operating revenues of the Rio Grande through August of 1946, which were in the record before the District Court, show a decrease of 37% under the corresponding period of 1945, or twice the percentage decline at the time of this Court's opinion. At the same time the operating ratio was 86% as compared with 61% in the first eight months of 1945 and 69% for the first eight months of 1944, immediately preceding the confirmation order. No one can pretend that since June 10 there has been any decrease in cost levels, which are an even more fundamental cause of the present critical railroad situation. On the contrary, it is known everywhere, and the Court may judicially notice, that the trend of costs has been sharply upward. The large wage increases of January 1, 1946, the addition to them by the Crosser Bill of July 31, 1946, raising pay roll tax deductions, and the sharp increases during this year in the various standard indices of consumers' prices and wholesale prices are familiar to all. Not only is there no basis for any argument that there has been any improvement in conditions, whether generally or of this particular property, since the opinion of the Court on June 10, but the whole trend has been adverse to the Debtor's contentions.

It is traditional with courts of equity to accommodate their judgments to the situation existing at the time of de-

cree and to do justice as of that time.* As indicated above, this Court unmistakably endeavored, and successfully so, to do just that in its opinion of June 10. It is obviously frivolous to urge that since that time there has been any change of conditions favorable to the Debtor's argument. It is not in the public interest, for it can not increase respect for the judicial process, to permit the spectacle of a Plan, given finality by a judgment of this Court on Monday, to be enjoined by a Circuit Judge on Saturday. If it was competent for the Debtor to raise these questions again, this Court should take them now and decide them at once.

4.

Certiorari is a Proper Means of Remedy.

This Court has authority to bring a case before it for decision by a writ of certiorari granted "either before or after a judgment or decree" of the Circuit Court (Judicial Code, Section 240(a); 28 U. S. C., § 347(a)). Such procedure is provided for by Rule 39, which, in addition, states that reasons as in petitions after final judgment will be applied in granting or refusing the petition, adding:

> "That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason."

Nothing in the Bankruptcy Act restricts this plenary authority (Bankruptcy Act, Sec. 24, 11 U. S. C., § 47).

So certiorari is a means by which this Court may exercise

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*Randel v. Brown, 2 How. 406 (1844); Stonega Coke & Coal Co. v. Price, 106 F. 2d 411 (C. C. A. 4, 1939), cert. den., 308 U. S. 618 (1939), 116 F. 2d 618 (C. C. A. 4, 1940). See Tennessee v. Condon, 189 U. S. 64, 71 (1903).

its full authority. Specifically, it is apt procedure for ending a departure in the courts below from a previous mandate of this Court. The Court has said:

> "As respects the Federal courts, it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of this court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of this court." (*In re Blake and Others*, 175 U. S. 114, 117, 1899).

See also *American Construction Co. v. Jacksonville, Tampa and Key West R.*, 148 U. S. 372, 382 (1893).

While, of course, this Court usually acts only after final judgment in the Circuit Court, that is in order to permit the Circuit Court to pass on the controversy, in the expectation that its decision may well prove final and may in any event be informative to this Court. But whenever the Court deems it appropriate so to do, certiorari issues to review interim action, like an interlocutory injunction, which is analogous here. *E. I. duPont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100 (1917); *City of Denver* v. *New York Trust Company*, 229 U. S. 123 (1913); *American Construction Co.* v. *Jacksonville, Tampa and Key West R.*, 148 U.S. 372 (1893).

In this case it is neither desirable nor informative to await the final judgment of the Circuit Court. The only issues have

been finally adjudicated by this Court, and it is in the public interest that this Court should speedily declare the result.

At the moment, the District Court has before it not only the mandate of this Court commanding

> "that such execution and further proceedings be had in said cause, as according to right and justice and the laws of the United States [as applied in the opinion] ought to be had . . ."

but also an order of Judge Phillips ordering that

> "all proceedings to consummate the Plan . . . be and they hereby are stayed, and that no further action be taken under or pursuant to the order . . . confirming said Plan . . ."

The order of this Court, we submit, was final and could not be reopened. But, in the alternative, if it was not, then the order of the District Court denying the Debtor's motion was final, and may not be reviewed on appeal. And, finally, if debtors are to be permitted the extraordinary privilege of an appeal from execution of a final judgment already affirmed in this Court, surely it is in the public interest that this Court put an early end to the new appeal. If the slow pattern of initial review be followed again, such an interval will occur between the order of the District Court and the last order on the current set of appeals that a new appeal from that order will then lie as much as this one does. This means litigation without limit.

The situation of the Rio Grande, where all proper appellate review has now been had and the creditors are entitled to consummate the Plan, while bringing together these

two important railway systems and doing so at or near the close of the calendar year, is itself a sufficient reason for summary action by this Court. But the consequences to the public regard for law and order that may follow upon any other course are far more serious.

PRAYER AND MOTION

We respectfully ask that this Court may forthwith:

(*a*) consent (in view of the printed record that accompanies the petition) that the record so printed may be received in lieu of reprinting under the supervision of the Clerk, or, in the alternative, waive a printed record;

(*b*) abbreviate the time within which respondents may answer or reply;

(*c*) grant a writ of certiorari to review Judge Phillips' order of November 2, 1946, in such manner as to give this Court authority to dispose of the whole matter;

(*d*) summarily vacate and supersede such order;

(*e*) at the time of granting the writ of certiorari, without awaiting briefs or oral argument in usual course, enter final judgment dismissing the appeal from the District Court's order of October 30, 1946, or, in the alternative, summarily affirming that order;

(*f*) direct the immediate issuance of the mandate of this Court; and

(*g*) grant all such other relief as may be proper.

These requests are without prejudice to the motion for writs of mandamus and prohibition if the Court should feel that the relief sought should be granted through that means.

Dated November 9, 1946.

Respectfully submitted,

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE 1003 Electric Building Richmond 12, Virginia	HENRY W. ANDERSON GEORGE D. GIBSON JOHN W. RIELY *For Insurance Group Committee*
GRANT, SHAFROTH & TOLL Equitable Building Denver 2, Colorado	MORRISON SHAFROTH WILLIAM GRANT *For Insurance Group Committee*
SIDLEY, AUSTIN, BURGESS & HARPER 11 South LaSalle Street Chicago 3, Illinois	KENNETH F. BURGESS RAY GARRETT GEORGE RAGLAND, JR. WALTER J. CUMMINGS, JR. *For Reorganization Committee*
HUGHES & DORSEY International Trust Building Denver 2, Colorado	MONTGOMERY DORSEY *For Reorganization Committee*
RATHBONE, PERRY, KELLEY & DRYE 70 Broadway New York 4, N. Y.	ALEXANDER M. LEWIS *For Central Hanover Bank and Trust Company, Trustee, Rio Grande Western Railroad Company First Trust Mortgage*
DAVIS POLK WARDWELL SUNDERLAND & KIENDL 15 Broad Street New York 5, N. Y.	EDWIN S. S. SUNDERLAND JAMES L. HOMIRE *For Guaranty Trust Company of New York, Trustee, Rio Grande Western Railroad Company Consolidated Mortgage*
STEWART & SHEARER 45 Wall Street New York 5, N. Y.	W. A. W. STEWART *For United States Trust Company of New York, Trustee, Denver and Rio Grande Railroad Company Consolidated Mortgage*
MILBANK, TWEED, HOPE, HADLEY & McCLOY 15 Broad Street New York 5, N. Y.	ARTHUR A. GAMMELL *For The Chase National Bank of the City of New York, Trustee, Denver and Rio Grande Western Railroad Company Refunding and Improvement Mortgage*

APPENDIX

Section 77(f) of the Bankruptcy Act, as Amended.

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination

of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of Title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof."